Blue Circle Cement Company, Inc. *and* United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO, Local D421. Cases 17–CA–17447 and 17–CA–17563

November 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On April 20, 1995, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.

This case presents the issue of whether the Respondent unilaterally changed an established practice in violation of Section 8(a)(5) and (1). More particularly, the General Counsel contends that the Respondent unlawfully changed an established practice governing the entitlement of employees known as ''rotating shift'' or ''continuous shift'' employees to return to their previous workshift and rotation after a temporary absence. The judge found, however, that the Union had agreed to a contractual provision that amounted to a waiver of its bargaining rights, and that therefore the Respondent's conduct regarding this alleged practice did not violate the Act. We reverse.[1]

Facts and Discussion

The Respondent's production and maintenance employees are represented by Boilermakers Local D421 (the Union). The parties' most recent bargaining agreement expired on April 30, 1990. No successor agreement was reached. Accordingly, terms of the expired agreement continued to govern employees' terms and conditions of employment, along with certain lawfully implemented terms not relevant here, as well as those longstanding past practices that had acquired the status of established conditions of employment. See *Lamonts Apparel*, 317 NLRB 286, 287 (1995).

For many years, employees in several job classifications have worked a rotating shift. Each rotation starts on a different Wednesday over a 4-week period, resulting in a long weekend off once every 4 weeks. By knowing their rotation well in advance, rotating shift employees can schedule their vacations during advantageous periods to better assure a continuous number of days off. Further, certain rotations are more advantageous in particular years, i.e., when rotations are close to holidays such as Christmas or Thanksgiving. In contrast to regular or ''fixed'' shift employees, who bid on their choice of shifts every year between January and February, there is no annual shift preference for rotating shift employees.

The General Counsel contends that in April 1993 and again in June 1994 the Respondent impermissibly changed an established practice entitling temporarily absent rotating shift employees to return to their former rotation at the conclusion of their absence. In support of the contention of an established practice, the General Counsel and the Union presented unrebutted testimony that over many years, numerous rotating shift employees consistently were permitted to return to their rotation upon their return from an absence.[2] Notwithstanding this practice, in April 1993 and June 1994, the Respondent refused to permit employees Thomas Wayne Forrest and Jerry Emerson, respectively, to return to rotations they previously had occupied for many years. In both instances, the Respondent failed to negotiate with the Union regarding the assignments of Forrest and Emerson.

The judge acknowledged that the Respondent ''has accommodated employees in the past to be assigned to the same rotation with the same production crew'' that they had worked prior to their temporary absence. The judge reasoned, however, that the Union had waived its bargaining rights by virtue of the following provision at article VI in the expired bargaining agreement:

> Sec. 2. (c) The Company will continue the practice of giving senior employees in a department their choice of shifts, as long as qualified personnel with the necessary skills are available to perform the required work. This practice will apply only to permanent schedule assignments, as opposed to temporary scheduling for specific work such as major repairs and modifications of plant

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) in other respects by unilaterally changing terms and conditions of employment.

[2] No exceptions were filed to the judge's finding that ''employees in the former job classifications with rotating shifts for more than 20 years have been permitted to return to their original rotation.'' More particularly, the record shows that David MacIntire returned to his former rotating shift 7 or 8 years prior to the hearing after an absence of 8–10 months; Daryl Alsup had returned to his rotating shift twice in the previous 10 years; Rick Thomas had returned to his rotating shift twice in the previous 4 years; Bobby Thompson had returned to his former rotation at least once during the previous 2 years; George Smallwood returned to his former rotating shift 2 or 3 years previously; John Miller returned to his former rotation 2 years previous; and both Will Rainey and Barney Powell had returned to their rotations at least once.

> equipment. Also, this practice will not apply to continuous [rotating] shift employees.

The judge concluded that, under this provision, rotating (continuous) shift employees, such as Forrest and Emerson, had no right to ''their choice of shifts'' as set forth in article VI, section 2(c), in contrast to fixed shift employees, who had the right to a choice of shifts based on their seniority. The judge's reasoning essentially means that this provision confers on the Respondent sole discretion to determine who will occupy a rotating shift position when a rotating shift employee returns from a temporary absence. We disagree.

Article VI, section 2(c), of the expired agreement provides that the practice of giving senior employees their choice of shifts based on their seniority does not apply to rotating shift employees.[3] Unlike senior fixed shift employees, who can bump junior employees on an annual basis when shifts are chosen, rotating shift employees cannot do so under article VI. Put another way, once an employee secures a rotating shift position, that employee is not subject to bumping by a more senior employee. The limitation or constraint on the exercise of seniority as to rotating shift employees set forth in article VI, section 2(c), however, is wholly inapplicable to the dispute at issue in this case. We are concerned here with the practice of returning an employee to a particular rotation after a temporary absence, based not on any claim of seniority, but based on an employee's incumbency in that position irrespective of seniority. Accordingly, the limitation imposed by article VI on the exercise of seniority is of no relevance here because the entitlement has nothing to do with the exercise of seniority. As Douglas Pardee, the Respondent's operations manager, admitted at the hearing when describing his discussion with the Union over this matter: ''I don't remember it as a seniority issue. I remember it as, 'Hey this is his shift . . . . We want to put him back in the shift.'''

In short, article VI, section 2(c), as a provision governing the use of seniority in shift assignments, simply is inapplicable to the question of whether employees are entitled to return to their rotations at the conclusion of temporary absences, an issue that is unrelated to any claim of seniority. It follows, therefore, that article VI, section 2(c), cannot be considered a waiver of the Union's right to bargain over the change in the established practice of returning temporarily absent rotating shift employees to their rotation.[4] Further, it is evident and essentially uncontradicted that an established practice exists permitting rotating shift employees to return to their rotation at the conclusion of a temporary absence. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the practice of returning rotating shift employees to their rotation upon their return from a temporary absence without bargaining with the Union.[5]

AMENDED REMEDY

Having found that the Respondent additionally violated Section 8(a)(5) and (1) by unilaterally changing the practice of permitting the return of rotating shift employees to their rotation at the conclusion of a temporary absence, without bargaining with the Union, we shall order that the Respondent rescind its unilateral action and provide the Union with the opportunity to bargain over any changes in unit employees' working conditions. We shall also order the Respondent to permit employees Thomas Wayne Forrest and Jerry Emerson to return to their former rotations if they so desire and to reimburse them, with interest, for any losses incurred as a result of the failure to permit them to return to their former rotations.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the

[3] The expired bargaining agreement does not specifically refer to employees' entitlement to return to their former rotation, or to the Respondent's authority to determine such assignments at its discretion. Art. IV of the bargaining agreement provides that the Respondent shall control the direction of the working forces. As the judge recognized elsewhere in his decision, a general contractual provision of this type is not sufficient to establish a clear and unmistakable waiver of the Union's right to bargain. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

United Technologies Corp., 300 NLRB 902 (1990), on which the Respondent relies, is distinguishable. In finding that the union in that case waived its right to bargain over the decision to change the length of the Saturday overtime shift from 5 to 8 hours, the Board relied on the wording of the management functions clause, which specifically authorized the company unilaterally to determine ''shift schedules and hours of work.''

[4] Contrary to the Respondent's contention, we adhere to the clear-and-unmistakable waiver standard ''when determining whether contract language may be invoked as a defense to an alleged failure to bargain over changes in mandatory subjects.'' *Exxon Research & Engineering Co*., 317 NLRB 675 (1995). Moreover, in light of our finding above that art. VI, sec. 2(c), is inapplicable to the instant dispute, we would reach the same result under the less rigorous ''contract coverage'' standard of *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), cited by the Respondent.

[5] In finding that art. VI, sec. 2 (c), constitutes a waiver, the judge noted that returning a rotating shift employee to his or her rotation after a temporary absence may require the reassignment of the employee who occupied the rotation during the absence. We fail to discern how such an eventuality supports a finding of waiver.

We also find no merit to the Respondent's contention that the change in the practice of returning employees to their former rotation is not a substantial or material change inasmuch as the evidence shows that the change impacts on employees' work schedules and their workweek.

[6] Although the record shows that Forrest may have bid into another position subsequent to the unilateral change, we shall not limit the remedy available to Forrest if he desires to return to his former rotation.

Respondent, Blue Circle Cement Company, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO, Local D421 (the Union) as the exclusive representative of its employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, in an appropriate unit consisting of:

> All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act, as amended.

(b) Making unilateral changes in the wages, hours, and other terms and conditions of employment of its bargaining unit employees.

(c) Changing the work schedules, such as fixed shifts to rotating shifts, changing the call-out procedures of its unit employees, and changing the practice of permitting the return of rotating shift employees to their rotations following temporary absences, without prior notice to the Union or bargaining with it as the exclusive bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify and give the Union an opportunity to bargain about any changes in the bargaining unit employees' terms and conditions of employment, including any proposed shift changes, changes in the call-out procedures, and changes in permitting rotating shift employees to return to their rotations following temporary absences.

(b) Rescind the changes in the unit employees' work schedules, including the changes from a fixed shift to rotating shifts, the changes in the call-out procedures, and the changes in the return of rotating shift employees to their rotations following temporary absences.

(c) Reimburse the shipping clerks and make them whole for lost overtime pay with interest in the manner set forth in the remedy section.

(d) Permit employees Thomas Wayne Forrest and Jerry Emerson to return to their former rotations if they so desire and reimburse them, with interest, for any losses incurred as a result of the failure to permit them to return to their former rotations.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its plant in Tulsa, Oklahoma, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO, Local D421 as the exclusive representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, in an appropriate unit consisting of:

> All production and maintenance employees employed at our Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watch-

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

men, and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT make unilateral changes in the wages, hours, and other terms and conditions of employment of the bargaining unit employees.

WE WILL NOT make changes in the work schedules, such as fixed shifts to rotating shifts, changes in the call-out procedure of our unit employees, or changes to the practice of permitting the return of rotating shift employees to their rotation following a temporary absence, without prior notice to the Union or bargaining with it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify and give the Union an opportunity to bargain about any changes in the bargaining unit employees' terms and conditions of employment, including any proposed shift changes, changes in the call-out procedures, or changes in permitting rotating shift employees to return to their rotations following temporary absences.

WE WILL rescind the changes in the unit employees' work schedules, including the changes from fixed shifts to rotating shifts, the changes in the call-out procedures, and the changes in the return of rotating shift employees to their rotations following temporary absences.

WE WILL reimburse the shipping clerks and make them whole for lost overtime pay, as a result of our unilateral changes, with interest.

WE WILL permit Thomas Wayne Forrest and Jerry Emerson to return to their former rotations if they so desire and reimburse them, with interest, for any losses incurred as a result of the failure to permit them to return to their former rotations.

BLUE CIRCLE CEMENT COMPANY, INC.

Mary Taves, Esq., for the General Counsel.
John W. Powers, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on December 15, 1994, in Tulsa, Oklahoma, upon a consolidated complaint issued on October 6, 1994. The underlying charges were filed by United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO and its Local D421 (the Union). According to the allegations in the complaint, the Respondent, Blue Circle Cement Company, Inc. violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally changing (a) the working schedule of its unit employees, (b) the bidding rights of unit employees for workshifts, and (c) the call-out procedures of unit employees, without notice to the Union and without affording the Union to bargain.

The Respondent's answer of October 19, 1994, admitted the jurisdictional allegations in the complaint but denied that the Respondent had violated the Act.

Upon the record as a whole, including my observation of the witnesses and the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Blue Circle Cement Company, Inc. (the Company or the Respondent), with an office and place of business in Tulsa, Oklahoma, is engaged in the manufacture and distribution of cement and related products. With purchases and receipts of goods in excess of $50,000 directly from points outside the State of Oklahoma, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO and its Local D421, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Company's production and maintenance employees have been represented by the Union since 1963 (G.C. Exh. 2, Tr. 19). Four office clerical employees were included in the bargaining unit in 1974 (G.C. Exh. 3, Tr. 19). In 1983 the Company acquired the plant from Martin Marietta Company which also had a collective-bargaining agreement with the Union (G.C. Exh. 4, Tr. 19). The Respondent assumed the agreement and, upon its expiration, negotiated with the Union a new collective-bargaining agreement, effective until April 30, 1990 (G.C. Exh. 3, Tr. 21). Since then, the parties have been operating according to the terms of the expired contract. The Company implemented a number of proposals during the negotiations for a new contract, but the newly implemented proposals are not in issue here. In sum, for the purposes of this case, relevant are the terms of the expired contract (G.C. Exh. 3). According to the complaint, the Respondent unilaterally changed the working conditions of its unit employees in three distinct ways.

A. *Rotating Shifts*

In April 1994, the Company's six electricians who are unit employees were informed by Bob Pratt, electrical supervisor, that henceforth they would be assigned to a rotating shift schedule rather than their fixed shifts. They had been working according to fixed shifts where one electrician worked from 8 a.m. to 4 p.m., another from 4 p.m. to midnight, a third from midnight to 8 a.m., one who worked morning shifts for 3 weeks and evening shifts for 2 weeks, and two electricians who worked the day shift for 4 weeks and the midnight shift for 1 week (Tr. 27, 208). According to this system, the employees had the same days off, were able to select the shift annually based upon their seniority, worked

on the same schedule for the entire year, and knew their working hours in advance. Under the new system, an employee is assigned to seven midnight shifts, has 4 days off, and then begins a pattern of six morning shifts beginning at 8 a.m. with 2 days offs and resumes work with seven shifts beginning at 4 p.m. followed by 2 days off at which point the cycle returns to the midnight shifts. The employee witnesses agreed that the new system presented a hardship, such as disturbed sleep patterns, interrupted family life and the inability to bid on relief jobs. Relief work was often compensated with higher wages, it facilitated ''cross training'' and better familiarity with all aspects of the work. In addition, overtime options were adversely affected.

The Respondent announced the rotating schedule in April directly to the employees, without notice to the Union. Theodore Allen Adams, the Union's grievance committee chairman and negotiating committeeman, learned about the changes from the employees. He along with two other union officials met with Respondent's management, including Plant Manager Douglas Pardee, and requested an opportunity to bargain. As recalled by Adams, the meeting went like this (Tr. 30):

> And Mr. Jim King, he was a Maintenance Manager at the time. We had a meeting and discussed it and told them that the guys were very dissatisfied and we felt like, you know, that we wanted to bargain over it. Said, ''Hey, you know, we need to talk about this.'' And he said, ''Well, there's no bargaining about it.'' He said, you know, ''This is not a bargaining issue.''

The same parties met again on the following day. The Union repeated its request to bargain, but the Respondent rejected the Union's demand (Tr. 31).

The Respondent admits that it refused to bargain about its unilateral decision to institute rotating shifts for the unit employees, but argues that rotating shifts were consistent with the terms of the expired contract and past practice, as well as the rotating working schedules of other crafts, including control room operators or console technicians, shift repairmen, a crane operator, and lab technicians. The new system was necessary, according to the Respondent, to provide service on a 24-hour basis.

It is true that certain limited job categories of Respondent's work force were working on a rotating schedule. It is also true that for a limited period, in years past, electricians had worked under rotating schedules. From 1981 or 1982 to 1985, they worked on a rotating shift schedule—on an experimental basis according to Adam's testimony—during the period of time when the plant was managed by Respondent's predecessor, Martin Marietta and for a short period under the management of Blue Circle Cement. In any case, the Union ''filed a lot of grievances about that'' and the practice was discontinued in 1985 (Tr. 90, 264–265). In sum, the electricians have operated under a fixed schedule for approximately 10 years. The expired collective-bargaining agreement does not provide for rotating shifts for the electricians. The contract refers to both fixed and rotating shift employees, but it does not specify which of the various job classifications are assigned to such schedules.

It cannot be gainsaid that the assignments of working schedules of employees fall within the definition of ''wages, hours and other terms and conditions of employment'' of Sections 8(a)(5) and 8(d) of the Act. Indeed, the express language of the Act requires the Respondent to bargain in good faith with the Union about the wages, hours, and other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Here, the Respondent admitted to effectuating the change in working schedules for the electricians without notice to the Union or affording it an opportunity to bargain. The Respondent argues that the Union had waived its right because of the past practice.

Relevant to the consideration of past practice are the work schedules for electricians for the past 10 years, i.e., fixed shifts. When the employees were assigned to rotating shifts, for a few years between 1981 and 1985, the Union filed grievances protesting the electrician's rotating shifts. And since then, their work schedules have been on a fixed shift basis.

I cannot accept the Respondent's argument that the Union had waived its right to notice and the opportunity to bargain, because the Employer had imposed a rotation schedule in 1981 or 1982 and then reverted to a fixed schedule without bargaining with the Union. First, the Union had filed grievances at that time and had not simply acquiesced to the change. And it is well settled that the Union cannot be presumed to have waived its right without clear and unequivocal evidence. *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983). Second, it is clear that Respondent's reference to that period of time is too remote. It is the practice which has existed for the last 10 years which is controlling here and which the Respondent unilaterally changed.

Finally, Respondent's reliance on the management rights clause contained in article IV of the expired contract is also misplaced (G.C. Exh. 3, p. 6). Broad contractual provisions of this type are not sufficient to establish that the Union consented to a waiver of its rights to bargain over hours, terms and conditions of unemployment. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). It is clear therefore that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union prior to implementing a substantial change in the unit employees' working hours.

B. *The Change of Crew Assignments*

The complaint alleges as unlawful Respondent's refusal to permit unit employees to exercise their bidding rights into certain workshifts. Two employees, Thomas Wayne Forrest, a console technician and Jerry Emerson, a shift repairman, attempted to return to the same rotation after their temporary absence. However, the Company refused them to return to their original rotation shift. Forrest, for example, had been assigned to a rotation shift schedule for several years, where, as explained above, he worked for several weeks on the midnight shift followed by several weeks on the day shift and then on the evening shift with certain days off between shift changes. Forrest had bid to fill a temporary fixed shift job as a physical tester in the fall of 1993. In April 1993, that job ended and Forrest expected to return to his original rotation schedule. He was permitted to return to his former job but not to the same rotation and the same crew.

As a result, Forrest was unable to share his long 45 miles commute to work with another employee, he was unable to use his planned vacation without taking additional time off

work and was inconvenienced in the taking of electricity courses.

Forrest spoke to Frank Slosar, production manager, that he wanted to be assigned to the same rotation which he had prior to the temporary fixed shift job. But Slosar indicated that Forrest fill the current vacancy, rather than his old rotation which had been filled by another employee. Forrest then appealed to Plant Manager Pardee but was unsuccessful. The written schedule showed that he had not been assigned to the desired rotation.

The Union presented the issue to Respondent's management. Pardee, however, rejected the request, taking the position that ''it wasn't a bargaining issue'' (Tr. 71).

A similar situation involved employee Jerry Emerson, a shift repairman. He was on sick leave from March to June 1994, and the Company assigned him to a different rotation upon his return. Yet Emerson had been assigned to the original rotation for about 12 years.

The record shows that the Respondent usually permitted the employees to return to their original rotation from a temporary absence. The employees in the former job classifications with rotating shifts for more than 20 years have been permitted to return to their original rotation. The record contains the names of at least eight employees who, after a temporary absence from their rotating shifts, were permitted to return to the same production crew (Tr. 40–44, 74–78, 225).

The Respondent conceded that the employees had a right to return to their regular shift jobs after a temporary absence, but not necessarily to the same rotation or production crew to which they had been assigned before. According to the Respondent the issue is governed by expired contract in article VI, section 2(c), which recognized the practice of giving senior employees ''their choice of shifts.'' But the same provision exempts rotation shift employees when it states: ''Also, this practice will not apply to continuous shift employees'' (G.C. Exh. 3, p. 20). The Union argues, however, that continuous shift (or rotating shift) employees are exempted from their right in selecting their *initial* shift only, and that their right to *return* to a former rotation after a temporary absence is not covered by the expired contract.

While the record shows that the Respondent has accommodated employees in the past to be assigned to the same rotation with the same production crew, I agree that the contractual exemption constitutes an express waiver. The Union's argument that *initial* assignments may be exempt but not a reassignment after a temporary absence is not convincing, particularly since such a reassignment may not only involve the one employee making the request, but frequently another one who has filled in on the rotation, requiring also his reassignment. I therefore dismiss this allegation of the complaint.

C. *The Call-out Practice*

The Company sold cement after its normal business hours by ''a call out'' procedure involving its four office clerical employees who are unit employees. Console operators who receive incoming calls from customers refer the calls to one of the four office clericals known as shipping clerks. After hours calls are referred to them at home from where they handle the customers' orders.

About 20 years ago, console technicians who received calls from customers were required to handle the customers' orders themselves. Following the filing of a grievance by one of the console technicians complaining that the after-hour calls were too burdensome, the Respondent changed the practice so that presently the office clerical staff handles these orders at home. They receive 1-1/2-hour overtime pay per 2-hour period at home, if they receive at least one call during that period. The compensation for the office clericals under this procedure is governed by article VI, section 12 of the expired contract.

The responsibility of the shipping clerks working at home was similar to their duties during regular business hours. They would make a record of the customers' orders, prepare bills of lading and forward the bills of lading to the shipping area or loading dock for loading the trucks. Usually, the shipping clerks will inform their supervisor, James Benson, administrative manager, to keep him informed. During after hours, the shipping clerks usually fill orders from the Company's inventory by informing the shipping area to fill out a prenumbered bill of lading. Other duties include the following, as explained by Michael St. John (Tr. 151):

> Oh, you would have your main call which would be a direct order and you'd take care of that, or you might have a credit check. You may have a load destination change. You may have a truck breakdown. Just anything that pertained to a load of cement getting to the customer. It was our duty after hours, if we were called, to take care of that or call the appropriate people to make sure they were aware of what problem was going on.

On occasion, the demand for cement exceeded the Company's supplies and its inventories were low. The Company then adopted an allocation procedure to ration the sale of cement. Benson would prepare an allocation chart from which the shipping clerks were able to fill orders. Exceptions to the allocation procedure were only granted by Benson.

In early 1994, the Company experienced such a situation and operated in an allocation mode. Benson informed the console operators in May that they should hold the after hours calls for normal working hours and refer emergency calls to him (Benson) or Dale Fuzzell, in the sales department. Benson's memorandum of May 15, 1994, entitled ''After hours and Weekends Orders'' stated in part (G.C. Exh. 7):

> Until further notice, please continue to have the Console Operator take any afterhours and weekends orders, and hold those orders until the Shipping Clerk comes on duty for dispatching—6 AM the next morning, or 6 AM Monday if over the weekend—there will be no need to phone a Shipping Clerk afterhours.
>
> You may remind the customer that the order will be held for the Shipping Clerk and that no bill-of-lading will be available for loading until the Shipping Clerk comes on duty the next day.
>
> As is always the case, there may be extenuating circumstances where a customer feels he has an emergent need to have an order dispatched at times other than our stated times above, and in that case, please call me, or in my absence, Dale Fuzzell, and we will make the necessary arrangements to handle the problem.

The clerical employees learned of the new procedure when Forrest, a console operator, and St. John, an office clerical, saw copies of the memorandum. Management did not notify the Union and Benson conceded in his testimony that he did not inform the Union of his decision to bypass the shipping clerks in the call-out functions.

The General Counsel and the Union argue that the new procedure was a change in policy affecting the overtime hours and pay of unit employees and that the Respondent had a duty to bargain.

The Respondent argues that the Company had used the same procedure in the past, that it reverted to the usual procedure in December after the allocation procedure was no longer required, and that the procedure was consistent with past practice.

To be sure, the record shows that the shipping clerks, as most employees, were adversely impacted by the change in procedure. Their overtime earnings derived from the call-out procedure ranged from $1200 to $1500 per year. The Respondent suspended the practice effective June 1994 until December 13, 1994, when there were fewer calls, because customers would become aware that the Company would not fill orders after hours which had not been allocated. Nevertheless, I cannot accept Respondent's argument, and the record does not support, the notion that the issue is de minimis. The question then is whether the Respondent's past practice was consistent with the unilateral suspension of the call-out procedure. The testimony in this regard appears conflicting. St. John who prior to his job as a lab technician worked as an office clerical or shipping clerk for about 14 or 15 years, testified that the Company has experienced a shutdown virtually every year requiring allocation and a serious allocation ''during the early 80s.'' Yet the call-out procedure was not changed during those times (Tr. 158–160). Adams, testified that to the best of his knowledge the Respondent had always followed the call-out procedure even in times of allocation (Tr. 65–66). Adams conceded, however, that he did not have any personal knowledge about the call-out procedure in times of allocation, and he was somewhat unsure about the Company's practice (Tr. 124–126). Benson, on the other hand, testified that the Company's practice has been consistent and at times of a serious allocation, the last time being in 1978 and 1979, it similarly bypassed the shipping clerks (Tr. 291–292). According to Benson, the Company experienced a full scale allocation only once before in his memory (Tr. 298). While he stated that the Company bypassed the shipping clerk's role at that time, the record does not indicate to what extent, if at all, the Union consented or acquiesced in that procedure in 1979. But is clear that the Company had not changed the call our procedure since then. This supports the testimony of St. John and Adams that they had never witnessed the Company's unilateral change in this regard, presumably because their experience did not date as far back as 1979.

In sum, the record shows that the Respondent did not change the call-out procedure at any time during the past 15 years even though the Company's inventory has been low from time to time. Even if the Company did not have a full blown allocation since then as Benson's testimony would indicate, I cannot accept Respondent's argument that the one time occurrence in 1978 or 1979 is sufficient to indicate a past practice. This is particularly so, because the record does not support a finding that the Union had acquiesced at that time or more importantly, indicate a waiver in unequivocal and unmistaken language. Because the Respondent conceded, certainly during Benson's testimony, that it had not notified the Union of the change in the call-out procedure, I find that the Respondent's failure in this regard violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Blue Circle Cement Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers & Helpers, AFL–CIO and Local D421, respectively, are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material to these cases, the Union has been the exclusive collective-bargaining representative of the following appropriate unit:

> All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act, as amended.

4. By unilaterally changing the wages, hours, and other terms and conditions of employment of its bargaining unit employees, and by changing the work schedules from fixed shifts to rotating shifts of its unit employees and by changing the call-out procedures of its unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must be ordered to rescind its unilateral actions of changing the work schedules and the call-out procedures of its unit employees. The Respondent must be ordered to give notice to the Union and provide it with the opportunity to bargain in any future changes in the unit employees' working conditions. Finally, the Respondent must be ordered to make the shipping clerks whole for their lost overtime pay as a result of the unilateral changes in the call-out procedure.

Backpay for lost earnings resulting from Respondent's unilateral changes shall be computed as described in *Ogle Protection Service*, 183 NLRB 682, 683 (1970). Interest for backpay and reimbursements shall be computed as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]